CRIMINAL LAW THEORY AND CRIMINAL JUSTICE PRACTICE

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ABSTRACT

Criminal law theory is characterized by a longstanding debate between two broad positions: retributivism, which posits criminal law is justified by the moral demand to punish culpable offenders in accord with moral desert, and mixed instrumental-moral theorism, which posits that criminal punishment requires both an instrumental purpose and a prerequisite of offender culpability. Without attempting to mediate this ongoing debate, this Article addresses the practical implications for criminal justice institutions and procedure of each of these two dominant, competing accounts of criminal law and punishment. I argue that the mixed theoretical account is so deeply embedded in Anglo-American criminal justice practice that a system oriented toward retributivism would require substantial institutional reform. Piecemeal imposition of some retributivist commitments would conflict with the existing institutional expectation of mixed theoretical commitments in a way that would risk thwarting the goal of having punishment accord with moral desert: a goal which both sides of the debate share.

There are indeed many forms of undesirable behavior which it would be foolish . . . to attempt to inhibit by use of the law and some of these may be better left to educators, trades unions, churches, marriage guidance councils, or other non-legal agencies.

H.L.A. Hart

I. INTRODUCTION

English and American law leaves much undesirable behavior free of criminal punishment, but it does so, broadly speaking, in two distinct ways: Some undesirable behavior is free of criminal law because no statute defines it as criminal. Other undesirable behavior is criminalized but is unregulated due to discretionary decisions of enforcement officials not to prosecute, either occasionally or consistently. Thus, whether criminal law is an appropriate way to address undesirable conduct is a judgment sometimes made by legislatures and other times made by police, regulatory agencies, and prosecutors.

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Legislatures effectively delegate a portion of this set of judgments to enforcement officials. The criminal codes they enact are expansive and designed to be under-enforced;\textsuperscript{2} statutory offenses apply to much more conduct than anyone—including the legislators who drafted them—would want.\textsuperscript{3} That makes charging discretion pervasive and inevitable, in accord with the common law tradition.\textsuperscript{4} Enforcement officials commonly have choices between criminal prosecution and civil sanctions or other non-criminal remedies, and they always have a formal choice between charging and not charging even when criminal charges are provable. In making those decisions, prosecutors (and also, to various degrees, police and regulatory officials) weigh a set of familiar considerations: harm, blameworthiness, deterrent effects, alternative remedies or policy options, and resource constraints.\textsuperscript{5} Enforcement discretion is guided by a mix of practical considerations and concerns that are at the core of the theory of criminal law and punishment.

Criminal law theory speaks to all three of the components that create this criminal justice practice—criminalization, enforcement, and punishment. Consequentialist rationales, at least as far back as Beccaria, Blackstone and Bentham, have offered primary organizing premises, and varying strategies, for all three projects.\textsuperscript{6} Consequentialism assesses the morality and efficacy of actions by the results they bring about; for criminal punishment, the hoped-for result is typically crime reduction.\textsuperscript{7} Utilitarianism, the most prominent version of a consequentialist theory, assesses acts and institutions on whether they produce a net benefit, and this is the typical consequentialist ground by which criminal punishment is assessed—whether gains in crime reduction are greater than the costs of punishment policy.\textsuperscript{8} Punishment, on such an account, usually aims to deter, rehabilitate, or incapacitate, so its form should be designed to serve those goals. (This is an instrumental view of punishment, meaning punishment is designed to promote a particular goal.) In making enforcement decisions, a consequentialist official weighs costs and benefits of prosecution and punishment, such as consequences to

\textsuperscript{2} See infra Part II.
\textsuperscript{3} See infra Part II.
\textsuperscript{5} Id.
third parties or the possibility that greater punishment might offset less-than-universal enforcement.\textsuperscript{9}

Consequentialist values have long played a central and prominent role as justifications for Anglo-American criminal justice.\textsuperscript{10} But few adherents justify punishment exclusively in those terms. In contrast, deontological or moral-based accounts have long informed our conceptualization of criminal law and punishment. A strictly deontological approach justifies punishment on grounds of the actor’s fault and culpability\textsuperscript{11} and assesses actions in light of moral duties and without respect to consequences; an action may be good and morally required even if it has bad effects.\textsuperscript{12} A punishment regime built on deontological commitments reserves sanctions solely for culpable wrongdoers.\textsuperscript{13} Only after concluding that an offender deserves sanction based on his culpable conduct might a punishment regime then adjust punishment with instrumental purposes in mind. In recent decades, scholarly debate on justifications for punishment have been dominated by those who share a deontological commitment to punishment based on desert but disagree on what additional role consequentialist values should play in punishment.\textsuperscript{14} Put differently, debate tends to center on the relative weight that should be accorded to desert and to deterrence or incapacitation when making punishment decisions.\textsuperscript{15}

Anglo-American criminal justice institutions draw on both instrumental and deontological commitments for their lawmaking, enforcement, and punishment policies. Yet the combination creates ongoing tension in both scholarly debate and enforcement practice. Does a commitment to punishing offenders in accord with moral desert take primacy over other, utilitarian concerns, or do those other goals, --


\textsuperscript{10} \textit{See generally} Blackstone, \textit{supra} note 6, at *41 ("But in order to apply this [law of nature] to the particular exigencies of each individual, it is still necessary to have recourse to reason; whose office it is to discover . . . what method will tend the most effectually to our own substantial happiness.").

\textsuperscript{11} Such theories are longstanding, commonly traced in modern literature to Immanuel Kant, \textit{Metaphysical Elements of Justice} (John Ladd trans., 2d ed. 1999) (1797).

\textsuperscript{12} \textit{See} Alexander & Moore, \textit{supra} note 7 (noting deontological theories judge the morality of choices by criteria other than consequences).

\textsuperscript{13} \textit{Id.}


\textsuperscript{15} Some evidence of this success is the prominent role desert theory plays in the current drafting of a second \textit{Model Penal Code}. \textit{See} Slobogin, \textit{supra} note 14, at 670–71 ("Compared to the old Code, Tentative Draft No. 1 gives desert a much more conspicuous role in fashioning criminal sentences"); Am. Law Inst., \textit{Model Penal Code: Sentencing, Plan for Revision}, 6 Buff. Crim. L. Rev. 525, 528 (2003) ("The new ordering of sentencing purposes recommended for the revised Code is an adaptation of Norval Morris’s theory of limited retributivism, under which considerations of desert establish upper and lower limits upon penalties in specific cases, and utilitarian rationales may then be consulted to select the types and severities of sanctions within the allowable retributive range.").
when they conflict, have equal or greater weight in decisions to prosecute and punish? The choice matters at the level of social values and poses a challenge for theorists. It also has immense implications for the practical design of criminal justice institutions, including criminal codes and enforcement infrastructure and policy, as well for practices within those institutions.

No substantial scholarly literature argues for an exclusively consequentialist regime of criminal punishment without regard to individual culpability. Put differently, there is little disagreement that desert is necessary to justify punishment. The disagreement instead concerns the sufficiency of desert—whether desert alone is sufficient to justify punishment—and the strength of that sufficiency claim—whether desert's sufficiency creates something like a strong presumption to punish or, at the extreme, a State duty to punish. Broadly and with oversimplification, the debate can be divided into two representative camps: Retributivists give desert a dominant, presumptively controlling role as the purpose for punishment and give the consequences of punishment no role in justifying punishment. In contrast, “mixed” theorists—or “side-constrained consequentialists”—give instrumental goals such as crime prevention a critical role in justifying punishment but constrain this justification with a commitment to moral desert as a requisite to punishment. John Rawls, H.L.A. Hart, and Norval Morris each prominently developed versions of this position decades ago. Andrew von Hirsch and Andrew Ashworth, the most prominent advocates for punishment policy that emphasizes criminal sanctions' power to censure—to express blame or reprobation for culpable wrongdoing—are among the many who hold a version of the side-constrained consequentialist position now. These two camps—retributivists and side-constrained consequentialists—differ in ways critical to enforcement practice and punishment policy and, more theoretically, regarding the role and obligations of the State toward its citizens. My focus, however, will be on the starkly different implications for enforcement practice and for the design of justice institutions.

16. See Jules L. Coleman, Crimes, Kickers, and Transaction Structures, in NOMOS XXVII: CRIMINAL JUSTICE 318–21 (1985) (discussing how law and economics theorists might see the basis of criminality as either externally provided or as an assault on or violation of the transaction rules of society); BARBARA WOOTTON, CRIME AND THE CRIMINAL LAW: REFLECTIONS OF A MAGISTRATE AND SOCIAL SCIENTIST 31-64 (2d ed. 1981) (discussing whether the role of the court is penal or preventive).

17. The group that insists on retributivism in its strongest and purest form—those who insist that (a) only desert considerations may inform enforcement and punishment choices and (b) all deserving offenders must be punished—is either small or, arguably, nonexistent. Darryl K. Brown, Cost-Benefit Analysis in Criminal Law, 92 CAL. L. REV. 323, 364 (2004) (noting virtually all retributivist theorists accept the need for some discretion in sentencing).


This Article does not directly enter the debate on the central disagreement between these two views, namely, whether consequentialist concerns should play a role in justifying and implementing criminal law and punishment. Instead, it makes three broad points, all of which have practical implications for criminal justice administration. The first is that a purely or strongly retributivist criminal justice system would require a radically different set of institutions and practices from those that have developed in common law jurisdictions: different criminal codes, different enforcement apparatuses, and different punishment practices. Further, without such a near-revolution in Anglo-American criminal justice institutions, retributivism, if taken as policy prescription rather than solely as ideal theory, poses a serious risk of aggravating excessive punishment problems and other injustices in criminal law administration, where codes have been designed for discretionary application with an eye toward consequentialist concerns. Mixed accounts, in contrast, fit comfortably with traditional enforcement practices and also contain the conceptual components to address at least some features of expansive codes and sentencing rules. Mixed theories offer an account of criminal justice that is feasible to implement within longstanding Anglo-American justice institutions, which are constructed on some version of such an account (even though some practices violate commitments held by mixed instrumental/deontic theorists). To develop this point, the Article unpacks some of the underlying normative premises of criminal procedure as well as substantive law and punishment.

The second, shorter point is that the widely agreed-upon commitment to desert as a limit on punishment is unlikely as a practical matter to have a consistently moderating effect on punishment practice. Desert as a principle is too indefinite, and is too dependent for its specific content on contested judgments, to overcome the political and social forces that drive any punishment rationale toward severity in a society such as the United States, which has demonstrated in the last three decades a strong collective preference for incarceration.

The third point is a premise for and extension of the second. Deontological theorists commonly contend that consequentialist rationales justify excessive punishment because consequentialist arguments are not limited by moral desert. Yet evidence suggests that the opposite can also be true—there is ample evidence

21. The most thorough retributivist accounts recognize the need for different codes, and Moore's account—the most thorough of all—argues for radical revision of criminal codes as part of a commitment to a solely retributivist criminal law system. See Michael Moore, Placing Blame 754 (1997) (arguing that "all and only moral wrongs should be prohibited by the criminal law").


for the censure theorists' claim that consequentialism can (but does not necessarily) moderate prosecution and punishment.25 Neither the content and merit consequentialists, nor their deontic commitments, nor the rhetorical effect they and their commitments have in political, policymaking debates, inevitably push criminal law toward more severe or moderate penalties and policies. Both content and merit consequentialism depend on recurrently contested and evolving substantive judgments to specify their operational content. When the underlying political and social debate is unsettled, either account can be used in service of policies of exceeding severity.

The next Part sketches the normative commitments behind prevailing versions of criminal law, enforcement practice, and punishment policy. Part III adds some detail to the censure theory and retributivist positions, draws out their distinctions for these components of the justice system, and argues that retributivism depends on a criminal justice system so different from traditional Anglo-American models that its influence within existing institutions and practices is likely to be deleterious. The final Part details the limits and risks of any normative position in informing real-world policy and practice of criminal justice.

II. TENSIONS IN CRIMINAL LAW, ENFORCEMENT, AND PUNISHMENT

A. Substantive Law

Criminal law claims and aspires—at least through the writing of scholars and many courts—to distinguish itself from civil law and to justify its harsh and censorious punishments by defining offenses on the deontic basis of fault and blameworthiness and structuring adjudication to ensure that guilt rests on moral culpability.26 If that characterization (and limitation) holds, substantive criminal law can be understood to contain internal, moral arguments for enforcement in addition to the definition of offenses and sentencing determinations.

In fact, however, few if any close observers accept that deontic commitments to wrongdoing and culpability alone define and limit the actual scope of criminal law (and perhaps never defined and limited this scope). The idea that every criminal offense is defined by wrongdoing and culpability is aspirational and normative rather than descriptive—or at best, descriptive of the many offenses when one acknowledges many exceptions. Observers on both sides of the Atlantic overwhelmingly take the view that Anglo-American codes over-criminalize, meaning that statutes label conduct as criminal that should not be so labeled because the conduct

25. See infra notes 149–52 and accompanying text.
26. See, e.g., H.L.A. Hart, Law, Liberty and Morality 20–21 (1963) ("[W]e are committed at least to the general critical principle that the use of legal coercion by any society calls for justification as something prima facie objectionable to be tolerated only for the sake of some countervailing good. For where there is no prima facie objection, wrong, or evil, men do not ask for or give justifications of social practices, though they may ask for and give explanations of these practices or may attempt to demonstrate their value.") (emphasis in original).
is not sufficiently harmful and wrongful, and committing it does not manifest culpability.\(^2\) Strict liability offenses are but one form of the problem of non-culpability in statutory crime definitions.\(^2\) The expansive (and ill-defined) categories of regulatory and mala prohibita offenses also present questions of whether wrongfulness is inherent in many criminal violations.\(^2\)

Criminal law has plainly long contained offenses that are purely regulatory in nature and are enacted with purposes that are predominantly consequentialist, in that their sole or overriding aim is to prevent some socially undesirable action that itself has no significant moral import.\(^3\) Even substantial felonies now commonly define only early-stage preparation behavior or possession that is, in itself, harmless.\(^4\) These crimes demonstrate legislative decisions to use criminal law for instrumental ends even if the resulting statutes conflict with a plausible requirement of wrongdoing and culpability. Moral wrongdoing is not a sufficient condition for criminalization: many moral wrongs are not crimes.\(^5\) And many

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29. For an attempt to explain and justify mala prohibita crimes, see R.A. Duff, Answering for Crime 89-94, 172-74 (2007); for a critical response, see Husak, Overcriminalization, supra note 27, 106-19.

30. For example, certain environmental regulations. See Babbit, supra note 4.


32. Much immoral conduct, of course, is not criminalized. On non-criminal "villainy," see Leo Katz, Felony and Villainy: A Problem Concerning Criminalization, 6 Buff. Crim. L. Rev. 451 (2002). For a subtle account of the roles of wrongfulness and harm in certain crimes, see John Gardner, The Wrongness of Rape, in OFFENCES AND DEFENCES 1, 1-32 (2007). For a summary of the idea of the harm principle as a limitation on criminalization, see Andrew Ashworth, Principles of Criminal Law, 27-39 (6th ed. 2009) [hereinafter Ashworth, Principles]. Legislative use of criminal law for regulation without moral import is, in fact, a long tradition of which criminal law theory has been unable to take sufficient account, because it results in codes that defy coherent description on a few organizing principles. See Duff, Answering for Crime, supra note 29, at 89-94, 172-74 (2007); see also Lawrence Friedman, Crime and Punishment in America (1993) (providing a social history of crime and punishment from a perspective tinged with social science, and studying the relationship between criminality and
possession and regulatory offenses represent the point that moral wrongdoing also is not a necessary condition for criminalization.

The issue is still more complicated. Even the so-called "core" criminal offenses that meet the conditions of wrongdoing and culpability are often joined with companion civil statutes or regulations that target the same behavior. Fraud can be prosecuted either civilly or criminally under a variety of statutes. The same is true of certain thefts; in particular, theft of trade secrets and other intellectual property is widely addressed by civil remedies and is also covered by criminal statutes. Copyright and trademark infringement, employer compliance with labor standards and workplace safety regulations, a wide range of environmental regulations, among other regulatory regimes, all are backed by civil and criminal offenses. The same is true for mundane crimes such as small-scale property destruction. Those contemporary statutes have predecessors, from the nineteenth century and earlier, such as overlapping criminal and civil nuisance offenses in diverse settings including dams, mills, railroads, and disorderly houses.

These statutory regimes pose a different problem for the claim that criminal law is normatively distinguishable from civil law. Coextensive civil and criminal offenses imply that, even if wrongdoing and culpability define criminal liability, they are not necessarily sufficient to conclude that punishment is warranted. Other considerations must tip the balance between civil and criminal sanctions when the same culpable conduct is covered by both, and those factors are commonly prudential rather deontological.

All of these compromises with the traditional normative account of criminal law exist because many offenses are created with consequentialist purposes in mind—prevention of harm or risk—even if offenses include requirements of wrongdoing societal norms); Darryl K. Brown, History's Challenge to Criminal Law Theory, 3 CRIM. L. & PHIL. 271 (2009) (summarizing some offenses of these types).


36. See VA. CODE ANN. § 18.2-137 (2011) (granting judge authority to dismiss criminal prosecution for property damage if defendant pays victim compensation).


38. This implication exists where the criminal offense is not always charged when the offenses overlap, as in many copyright infringement cases.
and culpability. A code constructed with significant consequentialist aims leads code drafters either to forgo the defining characteristics of criminal law in service of those goals or to imply, through parallel civil statutes, that criminal punishment is not required in the event of culpable wrongdoing defined by criminal statute.

B. Enforcement and Adjudication

Legislatures' endorsement of instrumental functions for criminal law is one reason that criminal codes have long taken this conceptually expansive form. But another, critical reason is legislative perpetuation of traditional criminal enforcement practices. Legislatures enact more crimes than they want consistently enforced because of the common law tradition of prosecutorial charging discretion, a practice that stands in contrast to models of some civil law democracies in Europe.

Full enforcement of far-reaching codes is impractical simply as a matter of resources. Codes are cheap to expand; enforcement is not. Full enforcement would require more funding for police, prosecutors, courts, and prisons than democratic governments would likely tolerate. One suspects that expansive codes are politically sustainable only because they are not fully enforced, so that their true scope is not widely experienced, or perhaps even perceived. Legislatures limit the resources of criminal justice institutions as a means of limiting the enforcement of the expansive range of crimes that they enact. Broad codes require enforcement discretion; they are designed for discretion.


40. See Joachim Herrmann, The Rule of Compulsory Prosecution and the Scope of Prosecutorial Discretion in Germany, 41 U. CHI. L. REV. 468 (1974) (describing the traditional rule of compulsory prosecution, departures from it, and means to enforce it including court supervision of charging and dismissal decisions). German criminal justice traditionally disapproved of enforcement discretion, so that legislative crime definitions, rather than prosecutors' judgments, primarily defined criminal law's priorities and severity. See id. at 470–74; see also Markus Dirk Dubber, American Plea Bargaining, German Lay Judges, and the Crisis of Criminal Procedure, 49 STAN. L. REV. 547, 575–77 (1997) (recounting statutory history of German compulsory prosecution practice, including statutes that relaxed the requirement in 1924 and 1993). The German rule has been relaxed in recent decades with various statutory reforms, but German prosecutors still face more regulation than their English or American counterparts from courts, prosecutorial culture, agency oversight, and even victims, who can initiate some criminal actions and employ private prosecutors. See JOACHIM ZEKOLL, INTRODUCTION TO GERMAN LAW 431 (Tugrul Ansay & Don Wallace, Jr. eds., 2005) ("In the case of certain serious offenses, the injured person may also initiate proceedings by means of a private indictment . . ."); see generally Dubber, supra; Herrmann, supra.


42. I hold aside for now the issue of the public's inability to monitor unfair convictions closely and of the imperfections of majoritarian supervision of policies that disproportionately affect marginalized or disfavored minorities.

43. This is not a new problem and has been a habit of Congress's for decades. See Bernard D. Meltzer, The Supreme Court, Congress, and State Jurisdiction over Labor Relations: I, 59 COLUM. L. REV. 6, 46 n.144 (1959)
Prosecutorial discretion is more than a practical response to managing broad criminal codes. A regime of charging discretion rests on the view that fair prosecution requires a judgment more finely grained, and normative, than merely assessing sufficiency of evidence. While that finer-grained decision could be allocated to the stage of jury verdict or judicial judgment, a system of charging discretion implies that an additional decision on those terms is appropriate for executive officials at the charging stage, as a means, inter alia, to prevent some charges from proceeding to trial on grounds other than sufficiency of evidence. Charging discretion in the Anglo-American system lets enforcement officials substantially shape criminal law’s priorities, a task more often taken on by legislatures and trial adjudication in systems that lack such discretion.

In recent decades, criteria on which prosecutors exercise discretion have become more formally defined. The U.S. Attorneys’ Manual specifies principles (recognizing the likelihood of Congress cutting funding for enforcement if the National Labor Relations Board more vigorously pursued charges of racial discrimination).

44. In contrast, the German principle of legality allocates fairness decisions primarily to the legislatures rather than executive officials. This principle should not be confused with the Anglo-American doctrine of legality, although the two are similar: the German principle of legality requires prosecution of all offenders, whereas the Anglo-American doctrine of legality precludes prosecution of any act not forbidden by a law that gives advance notice that such conduct is criminal. See Zekoll, supra note 40, at 431 (“The principle of legality [in German law] . . . requires the state attorney’s office or the police to initiate an investigation once a sufficient suspicion exists.”). “Legality” as used in this Article refers only to the German or European principle.

The non-discretionary principle of legality means that all offenders who violate criminal law (for whom the government has evidence to prove guilt) must be punished; to do otherwise is to treat some differently from others without adequate grounds. See id. at 431–32. German criminal law has taken a substantially different path on its organizing purposes than the Anglo-American tradition of struggling over competing retributivist and utilitarian premises and goals. For an accessible account of the German theory of crime based on the concept of “legal goods” and punishment based on a goal of “positive general prevention,” see Markus Dirk Dubber, Theories of Crime and Punishment in German Criminal Law, 53 AM. J. COMP. L. 679, 681 (2005).

Prominent scholarly accounts argue for consequentialist concerns taking a central place in American enforcement decisions. Gardner, for example, would require that either all indicators—deontological and consequentialist—point in the direction of criminal punishment before initiating prosecution, or that one indicator counseling for liability must overwhelm the others counseling against. See Gardner, In Proportion and Perspective [hereinafter Gardner, In Proportion and Perspective], in OFFENCES AND DEFENCES, supra note 32, at 213. If a prosecution is justified by the offender’s wrongdoing and blameworthiness but would have weak or counterproductive deterrent effects, it should not be pursued unless the culpability interest outweighs the disadvantages of pursuing a policy that is, in consequential terms, ill-advised. For a different perspective that limits use of criminal law on a principle of parsimony, see John Braithwaite & Philip Pettit, NOT JUST DESERTS: A REPUBLICAN THEORY OF CRIMINAL JUSTICE (1990).

Consequentialism is also a dominant concern in scholarship on crime enforcement in particular contexts; a common theme is that zealous enforcement can have the unintended effect of increasing the magnitude of offending conduct. For two recent examples, see Miriam Baer, Linkage and the Deterrence of Corporate Fraud, 94 VA. L. REV. 1295, 1329 (2008) (arguing that in a wide range of ongoing fraud crimes, some enforcement practices may perversely encourage further wrongdoing because ongoing fraud is needed to conceal past wrongdoing), and Assaf Hamdani & Alon Klement, Corporate Crime and Deterrence, 61 STAN. L. REV. 271 (2008) (arguing that criminal liability for firms is a suboptimal deterrence tactic because it is a poor tool for improving internal firm monitoring and preventing wrongdoing, and the costs of punishment, including collapse of the firm and harm to its large range of stakeholders, outweigh the deterrence efficacy of criminal conviction).
for prosecutors’ discretionary charging judgments.\footnote{45} Reasons for declining to charge may include “an adequate non-criminal alternative,”\footnote{46} insufficient deterrent effect from a given prosecution, the need for informant cooperation in other cases, and “the personal circumstances of an accused.”\footnote{47} In some settings, an offender’s “voluntary disclosure of wrongdoing” or “remedial actions” after offending, as well as “collateral consequences, including disproportionate harm” to third parties from punishment of offenders, can justify non-prosecution.\footnote{48} England’s \textit{Code for Crown Prosecutors} adopts broadly the same model.\footnote{49} Prosecutors are urged to weigh the seriousness of the offense, the defendants’ voluntary remediation of harms, and “alternatives to prosecution,” including use of “cautions” or formal warnings by police.\footnote{50} Examples of non-prosecution policies for specific crimes are numerous.\footnote{51} This tradition, then, is one in which enforcement officials assess a range of consequentialist concerns in addition to wrongfulness and culpability when

\footnote{45. See generally U.S. ATTORNEYS’ MANUAL, supra note 33.}
\footnote{46. Id. at § 9-27.220.}
\footnote{47. Id. at §§ 9-27.230 (noting criteria for initiating and declining charges), 9-27.600 (noting criteria for non-prosecution agreements in exchange for cooperation). Prosecutors may also add additional charges against one defendant for the instrumental reason that they “[w]ill significantly enhance the strength of the government’s case against . . . a co-defendant.” Id. at § 9-27.320. Comparable criteria to forgo enforcement appear among the few state statutory guidelines providing enforcement guidance: “Antiquated [s]tatute[s]” and those that “serve[] no deterrent or protective purpose,” those that show a “[h]igh [d]isproportion[] [between the importance of prosecution and] [c]ost of [p]rosecution,” and those showing either a complainant’s “[i]mproper [m]otives” or “[v]ictim [r]equest” where non-prosecution “would not jeopardize the safety of society.” WASH. REV. CODE § 9.94A.411(1) (2011).}
\footnote{48. U.S. ATTORNEYS’ MANUAL, supra note 33, at § 9-28.1000 (“Federal Prosecution of Business Organizations, Collateral Consequences”).}
\footnote{50. Id. at §§ 4.16–17, 7.1. Even in light of evidence sufficient to charge, prosecutors may decline to charge because “the suspect has put right the loss or harm that was caused” by compensation or other remedy, or because the harm is minor, the prosecution would have a bad effect on the victim, or the defendant is elderly or ill. Id. at § 4.17(i). THE CODE FOR CROWN PROSECUTORS § 4.10 repeats and endorses Lord Shawcross’s statement as Attorney General that “[i]t has never been the rule in this country—I hope it never will be—that suspected criminal offenses must automatically be the subject of prosecution.” See The Full Code Test, CROWN PROSECUTION SERV, http://www.cps.gov.uk/publications/code_for_crown_prosecutors/codetest.html (last visited Feb. 29, 2012) (explaining provisions in THE CODE FOR CROWN PROSECUTORS governing whether to prosecute). Police “cautions” in lieu of prosecution, now resolve more than one-third of all English offenses. See Ashworth, Lost Cause, supra note 27, at 247.}
\footnote{51. Prudential non-prosecution policies are open and routine. The U.S. Department of Justice in 2009 announced a policy change to no longer prosecute medical marijuana distribution when authorized by state law, even though it remains criminal under federal law. See David Johnston & Neil Lewis, Obama Administration to Stop Raids on Medical Marijuana Dispensers, N.Y. TIMES, Mar. 19, 2009, at A20. Local jurisdictions make comparable choices not to enforce some drug offenses. See William Yardley, Some Find Hope for Shift in Drug Policy, N.Y. TIMES, Feb. 15, 2009, at A13 (describing Seattle police chief Gil Kerlikowske’s enforcement policies). In the corporate crime context, the Justice Department has increasingly opted for deferred prosecution agreements as a way to achieve civil remedies for corporate malfeasance, remedies that preclude later prosecution if monitoring finds the regulation was successful. See Brandon Garrett, Structural Reform Prosecution, 93 VA. L. REV. 853, 907 (2007).}
deciding whether to prosecute a criminal violation that is provable in court. Those policies indicate a commitment to consequentialism—to practical effects of criminal law beyond the allocation of desert for wrongdoing. Drug courts, which moderate or even forgo punishment in favor of treatment for some offenders, are an example. Notably, this commitment holds even with respect to crimes that are not in the conceptually marginal categories of strict liability, early-stage risk prevention, or commercial regulation, although instrumental concerns likely weigh more heavily in those contexts.

Prosecutors’ balancing of consequentialist and moral considerations characterizes not only the initiation of criminal process but its disposition as well. Plea bargaining has for decades dominated American adjudication, and it enjoys strong support from the United States Supreme Court, legislatures, and prosecutors. Bargaining, however, also carries implications about the nature and functions of criminal law. Assuming arguendo that prosecutors file only charges that are well-grounded in fact, on what grounds may they offer the most common concessions of a bargain—dismissal of some charges or a sentencing discount? A criminal process that allows those concessions routinely, meaning other than in unusual instances of necessity, allocates guilt and punishment on grounds other than desert. A plausible argument can be made—and is widely accepted in practice—that an offender who concedes guilt and expresses remorse deserves less punishment than one who does not, even though their completed offenses are the

54. The counterproductive effects of vigorous enforcement are well-recognized in regulatory settings. Agencies commonly develop criteria for priority among criminal, civil, and negotiated remedies to regulatory violations and employ negotiation in lieu of punishment as a means to achieve compliance. See Ashworth, Lost Cause, supra note 27, at 247 (quoting KEITH HAWKINS, ENVIRONMENT AND ENFORCEMENT 195 (1984)). This occurs because enforcement officials often see “their efforts to attain wider goals of their legislative mandate to be facilitated by the extensive (formal) non-enforcement of the specific offenses.” Id. In corporate contexts as diverse as health care, environmental regulation, and occupational safety, regulators have chosen to forgo criminal sanctions—sometimes after years of employing them aggressively—as part of a strategy to improve compliance with law by developing cooperative rather than adversarial relationships with offenders, thereby increasing legitimacy of legal regulatory regimes. See IAN AYRES & JOHN BRAITHWAITE, RESPONSIVE REGULATION: TRANSCENDING THE DEREGULATION DEBATE 8-49 (1992) (describing how overly punitive, distrustful, and aggressive enforcement in workplace safety and other settings engenders resentment and “resistance to regulation”); John Braithwaite, Criminological Theory and Organizational Crime, 6 JUST. Q. 333, 343-45 (1989) (arguing that criminal subcultures are less likely to develop where counterproductive stigmatizing is avoided); Darryl K. Brown, Street Crime, Corporate Crime, and the Contingency of Criminal Liability, 149 U. PA. L. REV. 1295, 1302-06 (2001); Timothy Jost & Sharon Davies, The Empire Strikes Back: A Critique of the Backlash Against Fraud and Abuse Enforcement, 51 ALA. L. REV. 239, 242-43 (1999) (noting a strong backlash among healthcare providers over handling of fraud prosecutions in health care professions).
55. See Santobello v. New York, 404 U.S. 257, 264 (1971) (Douglas, J., concurring) ("[P]lea bargains" are important in the administration of justice both at the state and at the federal levels . . .”); (citations omitted).
same. And yet the magnitude of discounts commonly employed does not seem explainable by that rationale alone. And as with charging policy, the practice of bargaining is in many cases explicit about grounds for a bargain being utilitarian rather than deontic. For example, concessions by the State might occur in exchange for a defendant's assistance in other cases, or simply for avoiding the burden of trial (especially one that is costly or requires testimony of a sensitive victim). At both the charging and disposition stages, then, choices in the structure of criminal process have critical implications for the nature of criminal law and for punishment policy that follows from it.

Lastly, for a final example of an adjudication rule that subordinates retribution for offenders in favor of other values, consider the rule against double jeopardy. That rule, which protects criminal acquittals from appellate review and retrial, inevitably prevents desired punishment of wrongdoers, some of whom are acquitted in an initial trial, for any number of reasons such as a trial judge's erroneous jury instructions or evidentiary rulings. It does so in favor of competing interests to which the Constitution gives priority, such as constraint of State power, deference to jury decision-making, or a priority for wrongful acquittals over wrongful convictions. In this sense, rules against double jeopardy also rest on the choice that punishment of all deserving offenders is not an overriding value.

C. Punishment

Finally, the same utilitarian-moralist tension marks the modern history of criminal punishment, and here consequentialism has found even more explicit success. Consequentialist theories justify practices by their outcomes, that is, whether they produce effects that serve a specified end such as crime prevention.

57. Hold aside the risk that the defendant's plea may be motivated by the temptation of the discount rather than remorse or even accurate admission of guilt.


59. See supra note 58, at § 5K1.1 (authorizing sentence reduction in exchange for substantial assistance to the prosecution); 18 U.S.C. § 3553(e) (2010) (authorizing sentences below the statutory minimum on grounds of substantial assistance); U.S. Attorneys' Manual, supra note 33, at § 9-27.400 (discussing defendant's cooperation with prosecution as a consideration in plea bargaining); United States v. Lopez, 385 F.3d 245, 254 (2d Cir. 2004) (explaining that part of the government's benefit in a plea bargain is avoiding "the burden of trial preparation").

60. U.S. Const. amend. V ("[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb . . . .").

61. See, e.g., Yeager v. United States, 129 S. Ct. 2360, 2368 (2009) ("Even if the jury's acquittal verdict is based upon an egregiously erroneous foundation, its finality is unassailable.") (internal citations and quotation marks omitted).

62. See supra Part I.
Deontological theories, in contrast, assess the morality of actions without respect to their consequences; an action may be good or necessary even if it has bad effects. A deontic structure of criminal rules implies a deontic theory of punishment, though the two have not always co-existed in practice. On a strictly deontological account, punishment may be justified solely because the offender deserves it, based on his fault and culpability, and the State may have a duty to punish even if punishment causes bad effects, such as increasing recidivism or imposing costs on third parties.

Criminal punishment has always been intended to carry an expression of moral censure. But utilitarians—especially Beccaria, followed by Blackstone and Bentham—were central influences on the modern reformation of English and American punishment practices beginning roughly at the turn of the nineteenth century. That early utilitarian influence had a largely moderating effect; it supported shifts away from capital and corporal punishments and toward prisons, where generations of policymakers experimented with means to reform prisoners through various regimens—silent penitence, various requirements of physical labor (the dominant nineteenth century model), discipline, incentives of recreation and other privileges, and occasionally education. Instrumental goals of prison and punishment policy evolved in the twentieth century but reform and rehabilitation remained primary goals of punishment policy. For roughly seven decades following the turn of the twentieth century (and longer in England), individualized sentencing and parole looked (formally, at least) to an offender’s rehabilitative prospects and status. Herbert Wechsler, who led the drafting of the Model Penal Code, noted in 1952 the prevailing instrumentalist criticism that criminal sanctions are wrongly focused on “the injury inflicted rather than the future danger the defendant may present and the requirements of effective therapy,” and the Model Penal Code ultimately adopted the consequentialist approach to punishment.

63. See Alexander & Moore, supra note 7.
64. Such theories are longstanding, commonly traced in modern literature to Kant, supra note 11.
65. See supra note 6 and accompanying text.
67. For an excellent history of American punishment practices emphasizing the role of prisoner labor in the development and maintenance of correctional institutions, see generally Rebecca McLennan, The Crisis of Imprisonment (2006), and David Rothman, The Discovery of the Asylum (rev. ed. 2002) (discussing nineteenth century American prisons and asylums).
68. For a statement of rehabilitation’s dominance in mid-century punishment policy, see Williams v. New York, 337 U.S. 241, 248 (1949) (“Retribution is no longer the dominant objective of the criminal law. Reformation and rehabilitation of offenders have become important goals of criminal jurisprudence.”).
policy that dominated the middle decades of the twentieth century. Several instrumental and other purposes are explicitly codified as the goals of federal sentencing.

Utilitarian accounts of punishment do not necessarily demand the traditional culpability requirement of criminal law. One might achieve greater gains (e.g., greater deterrence) from punishing even those who did not purposefully cause harm or who otherwise are at fault. Thus, criminal law’s moral structure does not always fit easily with instrumental punishment goals. Criminal law scholars of the mid-twentieth century struggled to reconcile the tension instrumental punishment posed to a moral-based criminal law. English and American scholars reinvigorated desert-based justifications for punishment beginning in the 1970s, and at roughly the same time sentencing policy, especially in the United States, began a shift toward much greater severity. There is now widespread agreement among scholars that culpability is necessary to justify punishment and should serve to limit sentences in accord with desert. Many jurisdictions’ sentencing policies commonly invoke desert as well as instrumental purposes, although incapacitation and deterrence have taken a more prominent position over rehabilitation.

70. Herbert Wechsler, The Challenge of a Model Penal Code, 65 HARV. L. REV. 1097, 1103-04 (1952). For a thorough account of the MODEL PENAL CODE’s failed efforts to incorporate the insights of legal realism, see Louis Michael Seidman, Points of Intersection: Discontinuities at the Junction of Criminal Law and the Regulatory State, 7 J. CONTEMP. LEGAL ISSUES 97, 107-15 (1996). The abandonment of culpability requirements was, for a time, a topic of prominent debate, reflected in Barbara Wootton’s radical proposal to eliminate criminal law’s requirement of fault and thus its distinctiveness from civil violation, so that punishment could be replaced with a fully utilitarian regime. WootTON, supra note 16, at 111.


73. Henry Hart’s classic article, The Aims of Criminal Law, 23 LAW & CONTEMP. PROBS. 401 (1958), is a prominent example. He argued against the “curative-rehabilitative” theory of criminal justice on several grounds, including “[t]he danger to the individual that he will be punished, or treated, for what he is . . . rather than for what he has done.” Id. at 407. The effect of deterrence and rehabilitation have goals in undermining criminal law’s moral condemnation of criminal conduct and thereby its ability to “define[] the minimum conditions of man’s responsibility to his fellows . . . .” Id. at 410.


76. See RICHARD SINGER, JUST DESERTS (1979); ANDREW VON HIRSCH, CENSURE AND SANCTIONS 6-17 (1993); Gardner, Introduction, supra note 72, at xxix-xxxi (arguing desert is necessary to justify punishment but sufficient only in combination with consequentialist purposes) (“It is perfectly possible to accept the former view while continuing to regard the latter view, in Benthamite spirit, as barbaric . . . . One had better be able to point to major instrumental benefits of the infliction of suffering or else it is hard to escape the accusation that the brutality is gratuitous.”); id. at xxvii nn.21-22 (citing defenses of the rectificatory and expressive views of punishment).

rationales predominate; in any case, it is fair to say the debate continues on whether specific examples of severe sentencing practices plausibly accord with a proportionality principle based on desert.

III. MIXED THEORY AND RETRIBUTION

Criminal law philosophy addresses, among other projects, the tensions in Anglo-American criminal justice that arise both from theorists' mixed normative commitments and from the rules and practices that make up criminal justice administration. I take this body of scholarship and, eliding notable differences within each camp, divide it along familiar lines into two competing accounts for how Anglo-American criminal justice ought to operate—retributivists and mixed theorists. I focus on the fit between each position and the established institutions that administer criminal justice in order to highlight the magnitude of Anglo-American institutional commitment to a mixed instrumental/deontic criminal law, and also to draw out the substantial revision of traditional criminal justice process that would be necessary if retributivism were taken seriously.

A. Mixed Theory, or Side-Constrained Consequentialism

Many criminal law theorists take the view that criminal law is justified both by a commitment to punishing offenders based on their desert and a commitment that criminal law should serve some instrumental function, typically crime (or harm) prevention or preservation of order.\(^78\) It might strive to achieve those instrumental ends through various punishment strategies, such as deterrence, incapacitation, or rehabilitation. Von Hirsch and Ashworth's censure theory, which emphasizes punishment's expression of reprobation for blameworthy wrongdoing but endorses consequentialist reasons for refraining from punishment, is one version of this account.\(^79\) John Gardner and Douglas Husak offer broadly compatible views, although with notable differences largely not relevant here.\(^80\) Husak, for instance, accepts that private imposition of suffering on offenders can fulfill retribution, making State punishment unnecessary,\(^81\) a view probably not shared by censure theorists. For all these theorists, moral desert provides a limit, or side-constraint, on punishment as well as justification for it.\(^82\) These accounts vary as to the relative role of desert and instrumental goals in determining sentences, but for all, desert defines at least the upper limit of punishment, which may be reduced for a

\(^{78}\) See supra Part I.

\(^{79}\) See Von Hirsch & Ashworth, supra note 20, at 12–33, 131–37, 161–62.


\(^{81}\) Husak, Retribution, supra note 27, at 971–72.

\(^{82}\) Especially in the censure theory account, punishment connotes blame in order to treat the offender as a responsible moral agent, and also communicates condemnation of wrongdoing. See Von Hirsch & Ashworth, supra note 20, at 12–33.
range of consequentialist interests; for others desert takes a more controlling role. These theorists do not all share the retributivist view that deserved punishment (or suffering) is an intrinsic good, but do generally share the view that instrumental goals in addition to desert are critical to justifying punishment, and that other, competing goods might trump the value of punishment.

Side-constrained consequentialists take the view that criminal punishment is not required for all offenses: if social order is secure and harmful wrongdoing sufficiently minimal, the State might forgo administration of criminal justice even though some criminal conduct continues. On this point mixed theorists depart from most retributivists. Mixed theory usually makes no claim about the necessity of punishing all wrongdoing or about a State’s presumptive duty to punish wrongdoers.

B. Retributivism

In contrast, retributivists share the commitment to guilt based on culpability and punishment based on desert, but they insist those values play an exclusive role in justifying punishment and a dominant or presumptively controlling role in its implementation. To retributivists, punishment of the deserving is an intrinsic good, regardless of its consequences (even perhaps its undesirable consequences). Views under the rubric of retributivism vary, but the strong retributivist position insists that the State is not simply justified but also obliged to respond to all culpable wrongdoing with proportionate punishment; this was Immanuel Kant’s point in demanding punishment even of his mythical last man. This strong-retributivist view implies a broader set of State goals than mixed theorists typically stress, such as a State duty to demonstrate respect for victims by punishing offenders or to right the moral imbalance of one offender wrongfully injuring another. It follows Kant on the view that the State should not abide private deprivation of rights, which declining to punish crimes would do. Retributivism thus implies a justice system

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83. von Hirsch & Ashworth, supra note 20, at 180–85 (distinguishing censure theory from Morris’s limited retributivism).
84. Id. at 24.
85. This contrasts with Kant’s insistence on punishing even the last offender before society disbands, a moment when punishment would have no instrumental purpose. See Kant, supra note 11, at 140. Kant can nonetheless be read as insisting on criminal punishment as a critical function of the state to control crime, rather than solely as pure retributivism. See, e.g., Nelson Potter, The Principle of Punishment Is a Categorical Imperative, in Autonomy and Community: Readings in Contemporary Kantian Social Philosophy 169, 178 (Jane Kellner & Sidney Axinn eds., 1998).
86. For example, for a discussion of “permissive retributivism,” defined as the idea that “one who is guilty may be punished,” see J.L. Mackie, Morality and the Retributive Emotions, 1 CRIM. JUST. ETHICS 3, 4 (1982) (emphasis added).
87. See Kant, supra note 11.
88. See generally Kant, supra note 11, at 140 (“last man” point); see also John Ladd, Translator’s Introduction, in Kant, supra note 11, at xxiii–xxxvii. The Kantian argument is more complicated with respect to victimless and risk-prevention crimes, a topic I leave aside.
with a strong principle of legality, meaning a regime of non-discretionary enforce-
ment of all provable offenses, untempered by competing consequentialist concerns.  

Michael Moore presents the strongest version of this view. For Moore, punishment of wrongdoers is a moral obligation of the State, and an attractive obligation at that. "For a retributivist, the moral responsibility of an offender . . . gives society the duty to punish." It is "essential to retributivism" that "we each have an agent-relative obligation to see that the guilty are punished." Other retributivists share similar views. Jean Hampton defines a retributivist as "someone who insists that the infliction of suffering following a wrongdoing is a moral obligation, regardless of societal symbols or conventions. . . . '[R]etribution' for a crime is a call for the infliction of a kind of suffering that (whatever the societal facts) we are morally obliged to inflict . . . ." Although Hampton fits in the mixed-theorist camp (and writes approvingly of dispensing mercy on the culpable), her extensive writing on retributivism describes retributive punishment as an essential, obligatory response to wrongdoing. Because wrongdoing toward another wrongfully implies superiority over the victim and an implication of a victim's lesser value:

What does not vary, on this view, is the requirement that a wrongdoer receive some kind of subjugating experience that represents him as the equal of his victim. . . . [T]he message implicit in his criminal act must be annulled. . . . [A] retributive response is necessary to deny the message implicit in the crime.

89. For a further discussion of "legality," see note 42 (discussing "legality" as defined by German law).
90. See Michael Moore, The Moral Worth of Retribution, in RESPONSIBILITY, CHARACTER, AND THE EMOTIONS: NEW ESSAYS IN MORAL PSYCHOLOGY 179–81 (Ferdinand Schoeman ed., 1987) [hereinafter Moore, Retribution]; see also Husak, Retribution, supra note 27, at 960 ("No contemporary criminal theorist rivals Moore in his unqualified enthusiasm for retribution.").
91. MOORE, PLACING BLAME, supra note 21, at 185, 754; Moore, Retribution, supra note 90, 179–81. Moore does concede that enforcement costs might be too great to justify enforcement. See MOORE, PLACING BLAME, supra note 21, at 663–64.
92. Id. at 158.
93. Id. at 15–22; see Jean Hampton, The Retributive Idea, in FORGIVENESS AND MERCY 111 (Jeffrie Murphy & Jean Hampton eds., 1988) [hereinafter Hampton, Retributive Idea]; see id. at 123 ("I do not believe retribution is foundational. Instead I believe it gets its irresistible character by being the conjunction of two basic ideas mandating the harm of the wrongdoer as a means to an end."); see also id. at 139 ("No matter how else punishment is justified, its role as a deterrent is a primary reason why societies inflict it on criminals.").
95. See generally id.
96. Id. at 15–22; see Jean Hampton, The Retributive Idea, in FORGIVENESS AND MERCY 111 (Jeffrie Murphy & Jean Hampton eds., 1988) [hereinafter Hampton, Retributive Idea]; see id. at 123 ("I do not believe retribution is foundational. Instead I believe it gets its irresistible character by being the conjunction of two basic ideas mandating the harm of the wrongdoer as a means to an end."); see also id. at 139 ("No matter how else punishment is justified, its role as a deterrent is a primary reason why societies inflict it on criminals.").

Other accounts of retributivism emphasize the need for punishment to redress the imbalance of rightful benefits and burdens created by wrongdoing. See, e.g., Herbert Morris, Persons and Punishment, 52 THE MONIST 474, 476 (1968). Similarly, in John Finnis's account, by committing an offense, an offender wrongly gained, relative to all the offender's fellows in the community against whose law . . . the offense offends: the advantage of freedom from external constraints in choosing and acting . . .


Jeffrie Murphy summarizes the “positive retributivism” position as the claim that deserved punishment is “the general justifying aim of punishment. The very point of having a practice of punishment is to guarantee that criminals will get their just deserts—even in cases where this would be clearly disutilitarian.  All of these accounts build on the Kantian idea that officials have a moral obligation, at least in the ideal, to punish criminal wrongdoing.

However, even the strongest statements of a duty to punish seem not intended to be taken literally. Moore (perhaps ambiguously) concedes other intrinsic goods compete with and might trump the good of deserved punishment. Dan Markel has been clearer on this point by developing in several articles a strong-form retributivist account that seeks to minimize the role for instrumental and non-desert concerns in punishment allocation. In general, then, the retributivist takes desert to fully justify the practice of punishment, seeks to bar or minimize non-desert considerations in prosecution and sentencing, and places a high value on the intrinsic good of censure as against conflicting goods.
An important background premise for the retributivist view is a broader view of the State's authority and obligations than the most prominent mixed-theory accounts take. When retributivists speak of the State's obligation to punish, the ambition is for the State to redress all moral imbalances created by one actor's wrongdoing against another, and thereby to promote and maintain equality among citizens. 103 Only by punishing wrongdoing, on this view, can the State demonstrate and communicate its respect for both offenders and victims. 104 Many retributivists take this commitment to equality and respect for the individual as critical to State legitimacy. These normative tasks, rather than direct attention to enhancing public order and safety, describe the State's objectives for enforcing criminal law. Mixed theorists, in contrast, generally insist that crime prevention is critical to punishment's justification (even if desert dominates punishment's specification, as von Hirsch and Ashworth, among others, argue), 105 and consequently posit more limited roles for the State. 106 With that instrumental purpose in mind, the State's failure to enforce need not imply a view regarding individual worth, as criminal law is not a critical function for preserving equality among citizens. 107

IV. IMPLICATIONS FOR ENFORCEMENT INFRASTRUCTURE

The contrast between these two views with regard to the legitimacy and importance of consequentialist interests in criminal justice is substantial but also familiar. Less familiar are the differences in their implications for traditional criminal justice administration. Mixed theorists offer accounts of punishment that are broadly compatible with prevailing institutions and many prevailing practices, which are built on compromises between instrumental and deontic commitments; their accounts provide significant but comparatively modest grounds for reform. Retributive theorists, on the other hand, imply a much more dramatic, wholesale reformation of criminal codes, prosecution practice, sentencing, and, more broadly, public resource allocation.

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103. Moore, Placing Blame, supra note 21, at 172–73; Michael Moore, Justifying Retributivism, 27 Israel L. Rev. 15, 34; Markel, Executing Retributivism, supra note 101, at 1186–89; Markel, Against Mercy, supra note 101, at 1442; Markel, Retributive Damages, supra note 101, at 267.

104. See supra notes 90–93 and accompanying text.

105. Von Hirsch & Ashworth, supra note 20, at 13, 28 (purpose of preserving order). For an argument that criminal punishment displaces retaliatory violence by victims, see Gardner, In Proportion and Perspective, supra note 44, at 213. For an account of the State limited by principles of proportionality and interests that compete with punishment goals, see Alice Ristroph, Proportionality as a Principle of Limited Government, 55 Duke L.J. 263 (2005).

106. Husak, for one, takes the view that retribution can be achieved by private imposition of suffering without State action at all. Husak, Retribution, supra note 27, at 971–72.

107. Mixed theorists typically accept an additional side constraint, however, that the State should not selectively enforce criminal law for invidious reasons, which would represent a State view regarding individuals' relative worth. This accords with the premise of equal protection in American constitutional law: the State can often act (or not) for any reason, as long as it is not a purposively bad reason such as racial animus.
A. Criminal Codes and Enforcement Policy

Consider first the scope of substantive criminal law. There is wide recognition among scholars that criminal codes include large numbers of provisions without plausible requirements of harm, wrongdoing, or culpability, either by targeting conduct (or failure to act) that is relatively innocuous (or that contributes only marginally to risk creation), or that includes no culpability requirement. If an offender’s moral desert is to be determined from the violation of a statute that prohibits no culpable wrongdoing, then the offender’s violation does not provide justification for desert-based punishment. This contrasts with the view that any breach of a sovereign’s valid law is culpable wrongdoing independent of its content. The same problem arises from sentencing rules that disproportionately punish for culpable conduct, especially if they do so explicitly for instrumental reasons.

Both retributivists and mixed theorists take desert as a sine qua non of punishment and thus should object to enforcement of statutes that fit this description. The practical solution to a requirement of punishment justified by desert when criminal statutes lack culpability requirements is to not enforce such statutes, or to enforce them only for a subset of violators who demonstrate culpability in their violation (as with violators who intentionally cause harm by conduct that is prohibited by strict liability statutes). Mixed theorists generally have an easier time with this solution. Even those who give a relatively strong priority to desert in enforcement and punishment policy, such as the censure theorists von Hirsch and Ashworth, are explicit that the State need not enforce criminal law vigorously (or perhaps at all if harm prevention is otherwise sufficient). Other side-constrained consequentialists, especially when they prioritize a harm principle as an additional requirement for criminalization, endorse non-enforcement with at least equal vigor; Husak seems to fit this description.

Retributivists are much more ambiguous about their solution. Markel admirably acknowledged the problem and offered an account of retributivist prosecutorial discretion, though one that seeks to limit prosecutorial declination on non-desert grounds as well as to support it when desert-based. But most of the stronger-form retributivist accounts are more ambiguous, and the strongest are susceptible to a reading that urges prosecution for all criminal statute violations, at least to the degree that resources permit, or to the degree that the good of punishment is not

108. Ashworth, Lost Cause, supra note 27, at 225; Ashworth & Zedner, supra note 27, at 21; Husak, Retribution, supra note 27, at 972; Markel, Against Mercy, supra note 101, at 1432. Many statutes that fit this description are hard to explain other than by instrumental purposes at the cost of punishing the non-culpable (or excessively punishing the marginally culpable)—rationales retributivists in particular should reject.


110. See, e.g., Ashworth, Lost Cause, supra note 27, at 225–56.

111. See generally Husak, Retribution, supra note 27.

112. Markel, Against Mercy, supra note 101, at 1432.
outweighed by competing goods.\footnote{See, e.g., Moore, Placing Blame, supra note 21, at 185. Other scholars have argued in some detail that Moore's account of this challenge is ambiguous. See, e.g., Zaibert, supra note 100, at 161–67; Husak, Retribution, supra note 27, at 965–70.} For example, Moore makes an argument for legal moralism—a criminal code that defines as crimes only moral wrongdoing.\footnote{See generally Moore, Placing Blame, supra note 21.} Such a code would make the retributivist prosecutor's job easy and provide a foundation for asserting a State's duty to punish wrongdoers, since all violators would be culpable. But Moore is unclear on whether he takes moralism to describe existing codes or to provide normative criteria for codes, and what enforcement policy should be if the former is not true (as is widely agreed to be the case).\footnote{Id.}

More generally, retributivist assertions of duties to punish, and of a State's broader purposes to correct moral imbalances and assert individuals' moral worth and equality by responding to criminal violations with punishment, imply additional reasons for enforcement and thereby make declining to enforce some criminal statutes harder to justify. Additionally, to the extent a retributivist takes the view that punishment is justified by the breach of a sovereign's criminal statute regardless of whether that statute defines culpable wrongdoing—a position some accounts can be interpreted to take—\footnote{Markel, Against Mercy, supra note 101, at 1449. For a related argument, see Duff, Answering for Crime, supra note 29, at 89–94, 172–74, and R.A. Duff, Crime, Prohibition and Punishment, 19 J. Applied Phil. 97, 104 (2002) (arguing for a duty to obey many mala prohibita offenses on grounds that those violations demonstrate "civic arrogance").} the justification, and thereby retributivist's presumptive obligation, to punish expands across the range of contemporary statutes that carry criminal punishment but lack culpability elements.

B. Prosecutorial Discretion

Even aside from the set of criminal statutes that criminalize non-culpable wrongdoing, retributivists and mixed theorists depart on the propriety of prosecutorial charging discretion for crimes that clearly demonstrate wrongdoing and culpability. English and American legislatures criminalize against a background of prosecutorial discretion, with the knowledge that prosecutors are not required to prosecute every provable violation and that they lack resources to do so.\footnote{See, e.g., Abuehawa v. United States, 129 S. Ct. 2102, 2107 n.3 (2009) (“Congress legislates against a background assumption of prosecutorial discretion . . . .”); Wayte v. United States, 470 U.S. 598, 607 (1985) (“In our criminal justice system, the Government retains ‘broad discretion’ as to whom to prosecute.”) (citations omitted).} Mixed theorists, which emphasize desert as a side-constraint or as a necessary-but-insufficient ground for punishment, accord with this tradition of prosecutorial discretion. If instrumental goals can be achieved by other means, the offender's culpability alone does not compel, or in some cases even justify, prosecution. Offenses of grave culpability but low recidivist risk, such as intentional homicide—even in a context of rare occurrence generally—may merit prosecution under a
view that gives significant weight to both instrumental and deontic values. Offenses of lesser (but undisputed) culpability with greater recidivist and harm prevention concerns might merit prosecution or no dependence on non-criminal alternatives to serve the instrumental objectives. This is the mixed-theory premise of existing prosecutorial discretion policies.

Retributivism excludes instrumental values in the justification of punishment and thus in the prosecutor’s charging calculus as well. Retributivism implies a charging practice governed by the European-style principle of legality, a presumption that prosecutors will decline to prosecute only on grounds of insufficient evidence or inadequate resources (holding aside the additional ground, on some retributivist views, for declining to prosecute because a violation of a particular statute manifests no culpability).

That shift in charging practice not only conflicts with traditional Anglo-American prosecutorial discretion but with legislative intentions for how code provisions should be enforced; legislatures have created many parallel civil and criminal statutes to address the same undesirable (and often culpable) conduct. The retributivist account has had little to say about this directly, but its implications would seem to require a change in legislation as well as prosecution practice. Not only must instrumental concerns be excluded as grounds for declining to charge, a retributivist criminal justice system would seem to preclude statutory schemes that authorize responses to culpable criminal violations with mere civil penalties or non-criminalizing regulatory remedies.

C. Public Resource Allocation

Despite their emphasis on a duty to punish, retributivists concede that the good of punishment may conflict with other goods, all of which call on society’s limited resources. Retributivism accepts, albeit reluctantly as a concession to a second-best world, resource constraints as a legitimate reason not to prosecute even while excluding instrumental concerns. Nonetheless, the presumptive duty to punish, premised on the intrinsic good of punishment and on the State’s multiple reasons for pursuing that good, counsels for a greater allocation of resources to criminal


119. See supra note 40 (describing the European-style principle of legality as defined by German law).

120. Another limited retributivist reason for declining to punish an offender is that the offender cannot understand the reason for punishment. See Hampton, Retributive Idea, supra note 94, at 132. But in most if not all cases, that incapacity should also mean that the offender is not culpable because he was incapable of making a moral choice for which he can be held responsible (the premise of the insanity defense), so punishment is not justified in the first place.

121. Such regimes are common in regulation of environmental risks, workplace safety, capital markets, and other contexts. See, e.g., notes 28–35 and accompanying text.

122. See MOORE, PLACING BLAME, supra note 21, at 663–64.

123. See, e.g., Murphy, supra note 97.
justice than mixed-theory accounts imply. Some theorists in the latter group reject that imposition of suffering is an intrinsic good even when justified and deserved. Nearly all mixed theorists imply weaker arguments for allocating resources to criminal punishment compared to competing good projects, because criminal law’s instrumental purposes can sometimes be achieved other ways, and the State’s role and goals with respect to wrongdoing is more limited.

D. Liability and Sentencing Provisions Disproportionate to Culpability

A final point to note is the common occurrence of conduct that plausibly falls under a crime definition but the wrongfulness of which does not match the statute’s designation or accompanying sentence range. Criminal law recurrently must address new forms of behavior and social problems, and statutory language often can be read to apply to a range of behaviors, which vary greatly in their wrongfulness. This is inevitable, given the limits of statute drafting. And it presents a greater challenge for retributivists than those who endorse consequentialist values in the discretionary application of criminal law.

Consider “sexting,” a neologism that describes sending nude or provocative photos via cell phone. Typically, it entails teens who send photos of themselves; sometimes they forward photos of a dating partner or acquaintance. Often, they send images to a recipient whom they are dating, but sometimes to others; some photos are intended as flirtation, some as a form of aggression or a means to embarrass. That conduct fits plausibly under felony statutes prohibiting distribution of child pornography, which carry substantial sentences (and ancillary consequences such as registration as a convicted sex offender). Consensual versions of the practice are arguably not even wrongful, though criminal law’s traditional paternalism regarding youthful conduct can justify prohibition. But nonconsensual versions (to embarrass or to intimidate) are wrongful, though the wrongfulness arguably is not proportionate with felony liability or required sentencing range.

125. See, e.g., William M. Sloan, Mail and Wire Fraud, 48 AM. CRIM. L. REV. 905 (2011) (discussing use of the federal mail and wire fraud statutes to prosecute new forms of fraud until Congress enacts particularized legislation). See generally SIMON, supra note 23.
126. See Rubin v. Garvin, 544 F.3d 461, 467 (2d Cir. 2008) (“[E]ven a criminal statute need not achieve meticulous specificity at the expense of flexibility and reasonable breadth.”) (citations omitted) (internal quotation marks omitted).
128. See id.
For all theorists who justify punishment on desert, the implication of excessive liability and punishment is problematic in such cases, because the desert principle mandates proportionality in punishment. For mixed theorists, the prosecutor's decision is easier: they endorse grounds of non-prosecution in addition to disproportionate punishment, such as reliance on non-criminal remedies—the responses of parents, school officials, or private institutions. Retributivists, again, are in a bind: the conduct is wrongful and is prohibited by a criminal statute, giving rise to a justification to punish and, for many, a presumptive duty to do so. But that justification conflicts with the proportionality commitment. It may be that the proportionality principle trumps the duty to punish, but that is not clear from a retributive account.

The type of discretionary decision here is not an uncommon one. In part, this is due to statutes that apply to unanticipated versions of prohibited conduct. But the problem is greatly expanded by sentencing policies that increase punishments with mixed instrumental and desert rationales, so that mandated sanctions exceed an offender's desert. That problem confronts mixed theorists as well, on all accounts that both require desert as a punishment justification and limit punishment in accord with desert. Thus, retributivism and mixed theories alike are bases for criticizing those policies. But mixed-theorist prosecutors have an easier time until legislative reform comes, at least for the subset of cases in which instrumental grounds provide reasons for declination that also solves a problem of excessive punishment.

Such conflicts occur, in fact, not only as new behaviors emerge under old statutes, but as various forms of conduct lose their wrongful natures over time. Judgments about wrongfulness have varied over time even for core crimes, a

130. See text accompanying note 1, supra; Husak, Retribution, supra note 27, at 971–72.

131. Disregarding, for the moment, the debate on statutory interpretation, where one approach might be cabined by the statute's core applications or by the drafters' intent. See Fred Schauer, A Critical Guide to Vehicles in the Park, 83 N.Y.U. L. REV. 1109, 1134 (2008).

132. Those who accept that conduct is wrongful because it breaches a sovereign's command face a greater problem, for the proscribed conduct expands to include consensual exchanges that are not wrongful on moral grounds outside the law.

133. An analogous controversy of statutory interpretation occurred a decade earlier when some American prosecutors applied existing criminal statutes to the problem of crack cocaine use by pregnant women. Prosecutors in some thirty states charged hundreds of women who ingested cocaine during pregnancy with various crimes such as child abuse, assault (of the fetus) with a deadly weapon, and felony distribution (through the umbilical cord) of cocaine to a minor. For a summary of prosecution efforts, see Lynne Paltrow, Punishing Women for Their Behavior During Pregnancy, in Drug Addiction Research and the Health of Women 467 (Cora Wetherington & Adele Roman eds., 1998). For a different example, see Heidi Meinzer, Idaho's Throwback to Elizabethan England: Criminalizing a Civil Proceeding, 34 FAM. L.Q. 165, 165 (2000) (discussing fornication prosecutions against pregnant teenage girls and their boyfriends); Scott Morris, Idaho Prosecutor: Old Law, New Plan to Curb Teen Pregnancy, WORLD MAG. (Nov. 11, 1996), http://www.worldmag.com/articles/282 (noting parenting classes are a part of the sentence).

phenomenon easy to understand if one accepts that wrongfulness is a matter of social agreement based on shared moral intuitions and social mores that evolve. Feminist-led movements strengthened the view that spousal abuse is wrongful. Gay rights movements helped change—even in the face of criminal law’s assertion of sodomy’s wrongfulness—widely shared views that homosexuality was wrongful. Far afield, the old regulatory crimes of forestalling, regrating, and engrossing (roughly, buying goods outside designated marketplaces, sometimes with the purpose of raising prices) were once “most heinous offense[s] against religion and morality.” But over time, with changes in economic theory and market practices, they (like most usury offenses) lost their wrongful natures.

In the Anglo-American tradition of enforcement discretion, prosecutors can adjust charging practices in these periods of transition when the legislature lags in adapting statutes to changed intuitions of wrongfulness. The solution for the retributivist prosecutor is less clear and depends on resolving the issue of enforcing code provisions that do not accord with legal moralism.

E. Retributivism as Theory Versus Practice

The foregoing suggests that retributivism is not well-matched with the Anglo-American criminal justice traditions. This is only a concern, however, if retributivism is taken as a practical basis for justice administration without a wholesale reform of criminal law, procedure, and sentencing. If one takes strong-form retributivism as a project in ideal theory, in the manner of Rawls’s *A Theory of Justice*, constructing principles in an ideal world that can subsequently be used to inform real-world practices and reforms, then it is not an account intended to be put in practice. Alternately, retributivism might be read as an explicitly normative project defining grounds for reform of existing practices, an aim that many mixed theorists explicitly adopt. If that is the aim, then its implications are far-reaching for enforcement and adjudication practice. The critical point is to recognize that

135. Cf. Meinzer, supra note 133 (describing the use of an outdated statute to attack current practices not otherwise illegal).

136. See Anne Sparks, *Feminists Negotiate the Executive Branch: The Policing of Male Violence*, in *FEMINISTS NEGOTIATE THE STATE: THE POLITICS OF DOMESTIC VIOLENCE* 35–42 (Cynthia R. Daniels et al. eds., 1997); see also Leigh Goodmark, *Autonomy Feminism: An Anti-Essentialist Critique of Mandatory Interventions in Domestic Violence Cases*, 37 FLA. ST. U. L. REV. 1 (2009) (arguing a third-wave feminist vision of anti-essentialist feminist policymaking should pivot from viewing women as victims, thus imposing mandatory arrest, to policies that empower women who want to be seen as individuals, agents, and actors).


138. See 4 BLACKSTONE, supra note 6, at *158.


140. For a recent example, see Depository Institutions Deregulation and Monetary Control Act, 12 U.S.C. § 1735f-7 (2006) (exempting qualified loans from state usury laws absent permissible state override).

141. See generally SIMON, supra note 23.


143. VON HIRSCH & ASHWORTH, supra note 20, at 14.
strong-form retributivism is not suited to determine enforcement and punishment decisions in established criminal justice systems and to justify exclusion of instrumental values in those decisions until there is wholesale systemic reform of, at the least, substantive criminal law, sentencing rules, and resource allocation decisions that finance the institutions to implement them.

F. Normative Status of Traditional Justice Practices

If traditional criminal justice practices are so thoroughly structured in accord with a mix of instrumental and deontic purposes, it bears brief consideration whether those traditions carry some normative weight in the debate between retributivist and mixed accounts, weight that naturally favors the latter set of views. A full assessment would revert into the ongoing debate over each camp’s merits and persuasiveness, an endeavor I will forgo, but a limited point bears mention.

Legal justice institutions arise ultimately from democratic preferences, institutions, and in the English and American contexts, from democratic processes informed by common law tradition. Outcomes of legitimate democratic decision-making, even when they accord with constitutional limits, are not, of course, per se normatively legitimate.144 Legitimacy depends on the reasons justifying a policy or practice and on compatibility with public values.145 On these grounds, prevailing practices such as plea bargaining and exceptionally long incarceration terms are vulnerable: the former because of the often coercive nature of the choice placed on defendants, and the latter because such a wide array of normative views—across the set of retributivist and mixed-theory views that make up most of Anglo-American punishment theory—find them unjustified.

On the other hand, policies that find support in some, if not all, well-defended normative views arguably gain additional legitimacy from a democratic pedigree, particularly a longstanding one, since democratic processes over time can change even entrenched policies.146 One reason for that additional legitimacy is that it reflects an accord between relatively elite views (such as scholars’ work) and popular public sentiment, which eventually (if not immediately and consistently) tends to shape democratic policymaking. On that view, much of the mixed instrumental/desert account of criminal law has won the imprimatur of democratic endorsement, as have the institutional practices grounded in it.

Prosecutorial discretion is one such practice, at least on the typical instrumental, non-invidious grounds such as displacement of punishment by civil remedy or other non-punitive responses (such as drug court treatment programs147) oriented

144. See Peter Fabienne, Political Legitimacy, in STANFORD ENCYCLOPEDIA OF PHILOSOPHY, supra note 7.
145. Id.
146. For example, consider the evolution of gay rights. See ESKRIDGE, supra note 137.
147. See supra note 53.
toward prevention and remediation. Implicit in this tradition of justice administration is the choice for the State’s punishment practice to carry less weight with respect to expressing a view on individuals’ moral worth (that is, non-punishment does not necessarily signal disrespect of victims or offenders) and a concomitantly circumscribed set of ambitions for the State’s enforcement and punishment policy.

If this view on legitimacy from democratic tradition has merit, retributivism faces a further normative challenge, on top of the practical one, implicit in the sweep of institutional revision that its account implies for Anglo-American criminal justice.

V. EFFECTS OF CONSEQUENTIALIST AND DEONTIC VALUES

The standard assertion of theorists committed to the desert premise for criminal punishment is that desert limits punishment, and particularly that it does so in a way that consequentialist purposes for punishment cannot. Common criticism of alternative grounds are that rationales of deterrence, incapacitation, and rehabilitation treat offenders as means to policy ends or as objects of paternalistic policy. Consequentialism often fails to respect offenders as moral agents; it may dictate longer sentences than moral desert justifies, or even permit punishment of the innocent.\textsuperscript{148} Critics note additionally that, as a practical matter, consequentialism has tended in fact to justify harsh punishment, particularly much of American incarceration in the last thirty years.\textsuperscript{149} Punishment not limited in proportion to an offender’s culpability and set instead in accord with predictions of future risks of wrongdoing is indeed a framework for extreme and excessive punishment.\textsuperscript{150} Consequentialist arguments recur in explanations for the harshest of contemporary sentencing practices\textsuperscript{151} and easily become the mode of criminal law extremism. Desert aspires to temper this debate with a moral constraint.

Yet at the same time, oddly, the converse of all this is sometimes true. Aggravation of punishment beyond the limits of desert is clearly not the only role that consequentialism can play in punishment.\textsuperscript{152} Many retributivists worry about

\textsuperscript{148} See Hart, supra note 1, at 1–52; Antony Duff, Legal Punishment, in Stanford Encyclopedia of Philosophy, supra note 7.

\textsuperscript{149} See Pew Center on the States, One in 31: The Long Reach of American Corrections 4 (2009) (describing various measures of U.S. incarceration growth in recent decades, including a 274% increase in incarceration in the last 25 years).

\textsuperscript{150} See Huigens, supra note 77, at 38.

\textsuperscript{151} See Garland, supra note 74; James Wilson, Thinking About Crime xiv (rev ed. 1983); Zimring & Hawkins, supra note 24, at 68; Huigens, supra note 77, at 38–39; see also Graham v. Florida, 130 S. Ct. 2030 (2010) (holding that a life-without-parole sentence for a juvenile convicted of a non-homicide crime is cruel and unusual under the Eighth Amendment).

\textsuperscript{152} No significant theory abandons deontic premises entirely; the debate is between those according consequentialism a prominent role and those who would minimize or bar it. A classic statement of a fully consequentialist regime of harm prevention—at least, one that substitutes psychological-medical framework for moral judgment premises—is Wootton, supra note 16.
instrumental concerns justifying sentence reductions below the deserved level of punishment, and censure theorists take criminal law's instrumental justification of crime prevention as a basis for declining to enforce some offenses when crime levels are low. Moreover, enforcement officials, especially in regulatory contexts, sometimes recognize that prosecution undermines the instrumental goal of prevention and so opt for civil or other remedies over prosecution.

At the same time, the challenge of any system in setting punishment to accord with moral fault is to specify punishment levels for offenses and rank those offenses according to relative desert. Yet setting a specific sanction solely in terms of moral desert is not a guarantee of moderation in sentencing policy, and there is good reason to believe (or fear) that desert-based punishments set by broad democratic processes and preferences may be considerably more severe than what many scholarly views of desert would find appropriate.

Regarding this question of the effects of deontic and consequentialist arguments in the political process, Dan Kahan offered a contrasting view to desert theorists' assertion of desert as constraint. He has suggested that value-centered arguments “heat up” rhetoric and passions while consequentialism often has a moderating effect. Deterrence rhetoric in particular, he argues, displaces the more socially contentious grounds of retributivist arguments for resolving questions of punishment. Deterrence theory follows the mode of instrumental analysis that dominates debate on civil and regulatory law, where the focus is on technocratic assessments of the efficacy of various policy or enforcement strategies in comparison to their costs and other trade-offs. That sort of technocratic policy talk provides a relatively “cool,” dispassionate discourse for topics that could easily generate contentious moral and political disputes, such as the value of human life in relation to the cost of regulatory precautions, or the magnitude of moral culpability for a crime causing bodily injury or risk of injury. By comparison, directly debating offenders' culpability and moral desert more easily leads to emotion-laden terms of debate that highlight conflicts among disparate moral value judgments and the

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153. See, e.g., Markel, Against Mercy, supra note 101, at 1425.
155. See Ayres & Braithwaite, supra note 54 (noting the movement toward a cooperative approach between prosecutors and regulated parties to avoid prosecution but alleviate societal wrongs through civil penalties).
158. Id.
159. Id. at 448–59.
underlying social and political tensions connected with the terms of disagree-
ment.160

Given the role of incapacitation and deterrence arguments in justifying Ameri-
can’s dramatic sentencing increases of the last three decades,161 it seems implau-
sible that instrumental arguments are consistently “cooling” and technocratic. What seems true, however, is that neither sort of principled argument in fact has necessary and consistent effects on criminal justice policy outcomes. Both can be bases for extremity or moderation. Retributivist and other desert arguments can work, at least rhetorically, to support harsh enforcement by providing “hot” rhetoric to complement contemporary views favoring severe incarceration (including “three-strikes” policies) and use of criminal law over non-criminal policy options.162 The same is true for instrumental arguments, which can take the form of rhetoric supporting preventive detention, long-term incapacitation-oriented sentencing, and “zero tolerance” enforcement, a policy that has characterized some American drug and weapon-possession crime enforcement. There seems nothing inevitably moderating in either mode of argument, and yet both can support moderation. A moral desert principle can justify punishment levels much more moderate than current American standards, as some retributivists argue.163 The specific policy form that any justification and purpose of criminal justice takes depends on the political and social context in which arguments are applied to specific circumstances in particular historical moments, a point related to Alice Ristroph’s well-developed argument on the distinction between elite and popular views of just deserts.164 Political context includes the form of democratic processes through which policy judgments are made. Some governing practices tend to produce better or worse decisions under a given view depending on how well they encourage deliberation, mediate populist views, or provide roles for expertise to influence policy.165 Those mechanisms affect how broad principles influence specific policy content, because broad principles are not susceptible to easy

160. Id.
161. See Ewing v. California, 538 U.S. 11, 14, 51–52 (2003) (concluding in both the plurality and dissent that California’s three-strikes sentencing policy represents a shift from retributivist to incapacitation and deterrence purposes). See generally Zimring & Hawkins, supra note 24 (increased role of incapacitation arguments in modern American sentencing policy).
163. Committed retributivists may differ as to what quantum of punishment is proportionate to any particular culpable conduct. See Moore, Retribution, supra note 90, at 179–82. Thus, while many retributivists criticize prevailing sentencing policies, it is not true that retributivism per se condemns contemporary American incarceration rates.
164. Ristroph, Sentencing Reform, supra note 156, at 1297, 1314–27.
165. Id. at 1307–09.
specification, such as the prison term that defines just desert for a given transgression or that optimizes general or specific deterrence. 166

This ambiguity in the specific content and political effect of desert theory is a problem for both retributivists and mixed theorists. But there might be reason to worry that retributivism has the practical effect of heating up popular and political debates on punishment—that is, providing a rhetoric and normative framework to justify severity more than to limit passionate views that favor excessively severe sanctions. Or perhaps it is better to say that it poses a risk of doing so as much as consequentialist justifications risk prompting excessive incapacitation policies. The policy effects that principled arguments of this sort have are probably always uncertain. But in that uncertainty, it is plausible to worry about the effects of accounts that emphasize duties to punish and minimize grounds for moderating State imposition of suffering other than desert.

VI. CONCLUSION

Theories of criminal law and punishment have institutional consequences. I have suggested that the institutional implications of retributivism as an account of criminal law are more far-reaching than typically noticed or emphasized. Anglo-American criminal justice reflects a strong “path dependency” on its historical commitment to mixed instrumental and deontic purposes for criminal law and punishment. Minimizing—or rejecting and eliminating to the degree feasible—instrumental functions for criminal punishment, as retributivists advocate, would have wide-ranging consequences for established enforcement practices as well as sentencing policies. Many of those practices, such as prosecutorial discretion, are normatively defensible, as their defense (provided mostly implicitly) by mixed instrumental/deontic theorists demonstrates. Both accounts provide grounds to criticize some forms of existing practices, such as crimes without requirements of wrongdoing or culpability, discretionary prosecution decisions made on invidious criteria, or plea bargaining that coerces admissions of guilt and generates punishments that do not accord with desert (or even a defendant’s conduct). But recasting criminal justice along strong retributivist foundations would call for large-scale institutional and procedural reform. Absent such reform, it would risk aggravating injustice by eliminating instrumental considerations that can moderate criminal punishment in light of existing criminal codes and sentencing policy that conflict with the desert commitments shared by both retributivist and mixed theorists.

166. Id.